United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1248

To be argued by
Kirby W. Patterson

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, APPELLEE

v.

JOSEPH GENTILE and ERNEST LaPONZINA, APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

HONORABLE MARK A. COSTANTINO, Judge, Presiding

BRIEF FOR APPELLEE

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I N D E X

C I T A T I O N S

Cases:

Cases (CONT'D)

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No. 75-1248

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BRIEF FOR APPELLEE

ISSUES PRESENTED

1. Whether the prosecution of defendant LaPonzina was barred by double jeopardy.

2. Whether the trial judge should have disqualified himself sua sponte from ruling on a motion to set aside a verdict.

3. Whether statements made by defendants while they were being investigated for tax violations by an IRS agent

should have been suppressed as evidence in a prosecution for bribery and conspiracy to bribe the IRS agent.

4. Whether the government summation was proper.

5. Whether an exhibit was improperly given to the jury while they were deliberating.

6. Whether the evidence sustained LaPonzina's conviction.

7. Whether evidence of other offenses was improperly admitted into evidence.

STATUTE INVOLVED

18 U.S.C. 201(b) and the penalty provided are as follows:

> Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent--
>
> (1) to influence any official act; or
>
> (2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> (3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty * * *
>
> * * * *
>
> Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

STATEMENT

An indictment in the United States District Court for the Eastern District of New York charged: (1) that on June 14, 1972, Joseph Gentile offered a bribe of $3,000 to IRS employee Nicholas Tsosos, in violation of 18 U.S.C. 201(b); (2) that on June 15, 1972, Gentile gave said bribe, in violation of 18 U.S.C. 201(b); (3) that between June 14 and August 9, 1972, Ernest LaPonzina and Gentile offered and gave Tsosos $1000 and golf lessons as a bribe, in violation of 18 U.S.C. 201(b) and 2; (4) that between said dates LaPonzina and Gentile conspired to give Tsosos $1000 and golf lessons as a bribe, in violation of 18 U.S.C. 371[1/] (App. 5a-10a).[2/] A jury found defendants guilty as charged. Gentile was sentenced to concurrent terms of imprisonment for four years and a $5,000 fine (App. 604a). LaPonzina was sentenced to three years' imprisonment, to serve six months in the New York Community Center, the balance of thirty months to be on probation (App. 605a).

THE EVIDENCE

The Investigative Background of Bribe Offers

These prosecutions are part of a group of cases arising out of attempted corruption of IRS agents in New York

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1/ Counts 5 and 6 of the indictment against Gentile and Lucadana was severed.

2/ "App." refers to appellants' appendix, "Govt. App." to the government appendix, and "Def. Br." to the brief of defendant-appellants.

City (Def. Br. 3). The government's case was built around the testimony of special agent Nicholas Tsosos, of the Intelligence Division of the Internal Revenue Service. He was assigned to the investigation of Gentile's income tax returns for 1968, 1969, and 1970 and to the investigation of LaPonzina's returns for 1969 and 1970. The conversations between Tsosos and the defendant were recorded from a Kel transmitter that the agent carried on his person and played for the jury (Gov't App. 3b-4b; App. 51a-52a).

On September 8, 1971, Tsosos went with another agent to interview Gentile at the latter's office in Brooklyn, formerly used in a business of Gentile called "Rocket of New York". Tsosos showed his credentials, explained that he was a criminal investigator for the IRS and wanted to ask some questions, that Gentile did not have to answer them, and that anything Gentile said could be used against him in a criminal proceeding. Gentile said he understood that and to go ahead and ask him questions (App. 52a-53a). The ensuing interview centered around some $20,000 in checks which his income tax adviser, Vincent Lucadana, had cashed for him in 1969 (App. 54a). This inquiry was further pursued with Gentile and Lucadana on September 23, 1971. On November 31, Tsosos telephoned Gentile and requested records relating to these checks. Gentile refused to turn over the records, but said that he would answer questions about them and that he had cashed the checks as favors for other people (Gov't App. 5b). There was also an interview at a realtor's office on May 30, 1972 (Gov't App. 6b).

On June 12, 1972, Tsosos questioned Gentile closely about the checks cashed through Lucadana and as to his living at a rate of $25,000 a year while showing an average income of around $6,000. Gentile was evasive and gave conflicting statements as to the availability of his cancelled checks which might throw light on this discrepancy. Gentile suggested that if Tsosos produced copies of particular checks as to which he was referring, Gentile might be able to explain them (Gov't. App. 6b-10b).

The Offer and Giving of Bribe by Gentile

On June 14, in response to this suggestion, Tsosos brought about fifty checks cashed through Lucadana to Gentile. Tsosos pointed out that even when allowance was made for the checks which did not relate to income, there was still a wide discrepancy between the amount of money which Gentile was expending annually and his reported income. Gentile said that maybe he had done something wrong, but that many people were cheating the government and paying accountants huge sums to assist, and yet they were not arrested. He asked if "something was being done around the circle." Referring to an occasion the previous December when a friend of Gentile's, Frank Coppa, had taken Tsosos to a steak house where they had encountered Gentile (Gov't. App. 5b), Gentile explained that if he had been trying to establish a contact through Coppa, he would have said maybe there was some way they could get together (Gov't. App. 11b-12b). Gentile further said that corruption was a way of life and he was

not against it, provided no one gets hurt, that it goes on every day.

When Tsosos resumed talking about the checks (Gov't App. 12b(2)-17b), Gentile asked him whether he was talking for his boss's benefit or for his own. Tsosos indicated the latter. Gentile asked if there was any way to get around this (App. 58a-61a) and Tsosos asked what Gentile wanted him to do. Tsosos told Gentile the answer to his question was "Yes". Gentile said he did not want to hurt anybody and asked if there was anybody, perhaps a lawyer or another agent, to act for Tsosos. Tsosos said that none of the other agents knew anything about it and perhaps it would be better if they kept it between themselves (App. 63a-65a). Gentile asked Tsosos about his previous experience in such matters and offered several pointers as to how Tsosos could improve on his approach (App. 68a, 73a-75a). They then agreed that Tsosos was to get $3,000, and that it would be paid the next day (App. 66a; Gov't. App. 18b-29b). During the conversation, Tsosos told Gentile he had a case on LaPonzina and asked if Gentile could help him about a meeting.

On June 15, Tsosos went to the Rocket and met Gentile. Gentile pointed to a drawer in his desk, which Tsosos opened and found the money (Gov't. App. 30b-33b).

The Offer and Giving of Bribe by LaPonzina and Gentile

Immediately after the foregoing conversation on June 15, 1972, Gentile told Tsosos that he had talked with LaPonzina the night before and discussed the situation (Gov't App. 33b).

On June 29, pursuant to an appointment made by Gentile, Tsosos met LaPonzina at the Rocket. Tsosos told LaPonzina that he was conducting an investigation of LaPonzina's 1969 and 1970 taxes. Laponzina said that Vincent Lucadana had prepared the returns and answered questions about his own personal history and employment (Gov't. App. 34b-38b).

On August 3, Tsosos met Gentile in Manhattan and went to a nearby coffee shop. Tsosos told Gentile that his difficulties had been settled, but that there would be something to be paid on the civil claim. Gentile said that he had talked to "Ernie", who had asked his advice what to do. Ernie had consulted his attorney, who assured him that everything was in order, but Gentile wanted to know what Tsosos had to say. Tsosos outlined what his investigation had turned up, which Gentile partially confirmed (App. 100a-103a). Gentil talked about some of his experience in adjusting disputed matters. Gentile said that Ernie's case was worth $1,000. Tsosos said he wanted to talk with LaPonzina and find out what he wanted to do and what he wanted Tsosos to do. Gentile said he would talk with Ernie, give him the idea, then Ernie and Tsosos could work it out (App. 104a-107a).

On August 8, 1972, Tsosos went to Gentile's office at the Rocket, which he found open but empty. Outside at a short distance he found LaPonzina standing by his car. After they had both got into the car, the following conversation ensued (App. 118a-119a):

I said, "I wanted you to know, Ernie, what your intentions were," and he said, "Whatever you and Joe spoke about, no problem."

I said, "Well, I am not sure what you mean," and he gestured by rubbing his thumb and forefinger together in this way (indicating).

* * * *

After he gestured in this manner I said, "Well, what do you want me to do, discontinue the investigation?"

He said, "Yes," and I said, "write the case off?"

And Mr. LaPonzina nodded in the affirmative, and I said, that is why I wanted to see you because I did not want any misunderstanding. I felt that if you wanted to do something you would make your own deal."

Mr. LaPonzina said, "What do I know about it, Nick? It is all right."

And then he whispered that Mr. Gentile would give me the money and I said, "As long as there are no misunderstandings about that and as long as you are satisfied I am willing to go along with you guys."

During the conversation in the car, LaPonzina asked Tsosos if he played golf, which Tsosos said he did very poorly. LaPonzina promised to get Tsosos a half dozen free lessons with a friend, to straighten out his game. He then said that Tsosos could meet the next day with Gentile, who had something to discuss with him (App.131a-132a). They then went inside the Rocket office, where Laponzina made two unsuccessful efforts to reach Gentile by telephone and also wrote the name of the friend who gave golf lessons on the back of a card (Gov't. App. 426(2).

On the following day, August 9, Tsosos met Gentile at the Rocket. Gentile said he hoped Tsosos was satisfied with his

meeting with Ernie. Tsosos said that he was; he wanted to know what Ernie wanted him to do and that everything was all right. Gentile then handed Tsosos the thousand dollars (App. 136a-137a). Tsosos delivered the money to his supervisor (Tr. 341-342).

THE MISTRIAL

Defendants were tried by a second jury after their first trial ended in a mistrial under the following circumstances.

At the first trial, in his opening statement to the jury on December 3, 1974, the assistant United States attorney outlined fully the progress of events from the initial meeting of the IRS agent with defendant Gentile through the anticipated evidence as to the offering and giving of the two bribes. (Proceedings Dec. 3, 1974, 29-62). Concluding his statement, the assistant said that he had two reasons for having gone into such detail: (1) that the jury was going to hear tapes of these various conversations and (2) that the judge in his voir dire examination had mentioned a possible defense of entrapment and the jury was going to hear a lot of argument about motive and intent, so that they should listen carefully during the playing of the tapes. No objection was made during the opening statement (App. 11a-12a). When the court asked Mr. Schettino, attorney for Gentile, if he wished to make an opening statement Mr. Schettino asked for a sidebar conference and moved for a mistrial. He urged to the court that reference had been made throughout the opening statement to Gentile wanting to fix tax returns of other people, which was not a charge in the indictment, and

that the prosecutor had no right to anticipate a defense of entrapment in this case. The court said to the assistant, "Yes, you should not have made that statement" (App. 13a).

The prosecutor replied that one of Gentile's preliminary motions, made before Mr. Schettino was in the case, raised the defense of entrapment. The court told the prosecutor that the defendant has the right to do nothing, to stand mute and the prosecution has no right to anticipate his defense (App. 13a-14a). At this point, Mr. Klein, attorney for Laponzina, said (App. 14a):

> Suppose he rests now and does not put any defense of entrapment in. You have a mistrial.

The court told the assistant that "the jury has been told something", to which the assistant replied that defendant had opened the issue of entrapment in the voir dire examination entrapment. The court admonished the prosecutor that he had no right to anticipate what the defense would be. Mr. Klein joined in (App. 14a):

> Your main case is only what you are supposed to tell them.

The judge agreed, saying it raised a problem, he did not know how serious; it might not be serious at all (App. 14a). The prosecutor suggested reading back that portion of his opening statement; that he only mentioned the word "entrapment". The court told him he was anticipating a legal argument before it was made to the jury. Mr. Klein argued (App. 15a):

In view of the propensities shown by the transcript, he may have decided to avoid it. You brought it in now. He is either forced to go with it or sit still. If he does sit still, it is all prejudicial.

After the noon recess, the court asked if the motion for mistrial was being made by both defendants. Mr. Klein responded that it was Mr. Schettino who made the motion. When pressed as to whether he was making it too, Mr. Klein asked to consult with his client. He then told the court (App. 18a):

Your Honor, I spoke to Mr. LaPonzina and we feel that the question of entrapment really affects Mr. Gentile and it is not our motion to make.

When pressed further by the court, Mr. Klein said (App. 19a):

I do not join in the motion. I do not think it is mine to join in or not.

Normally you say you will go along with your brother attorney but Mr. LaPonzina is in a different position from Mr. Gentile.

The court said that Mr. Klein had taken part in the argument that the statement was prejudicial and joined in the motion. Mr. Klein replied (App. 19a):

I participated in it.

The court responded that, since Mr. Klein participated, it had a right to assume that he was joining in the motion. In its opinion, the better way to proceed would be to select a new jury; since a motion for a mistrial had been made, they could start with a clean slate (App. 19a). Mr. Klein insisted (App. 20a):

> On behalf of the defendant LaPonzina I do not join in the motion. I did not consent.

The court expressed the view that there was an implied consent and that both defendants were involved in the same manner and on the same tapes (App. 20a-21a). Mr. Klein answered (App. 21a):

> May I add for the record that my participation in the argument was in assistance of Mr. Schettino's argument and certainly not intended as a consent by Mr. LaPonzina.

The court replied that Mr. Klein represented his client for all purposes and that there could be no separation, one part from another. It thereupon denied motions to dismiss the indictment on grounds of double jeopardy, made by both defendants (App. 21a-22a).

The court then reviewed the facts and found that both defense attorneys had participated in the discussion and that each argued that the prosecution's opening statement, to which there had been no objection, would be prejudicial and could not be cured by court instructions. Taking into consideration all the circumstances, the court concluded there was "a manifest necessity for the act or the ends of public justice would otherwise be defeated by a failure to take such action", citing United States v. Perez, 9 Wheat. 579 (1824) and Illinois v. Somerville, 410 U.S. 458, 464 (1973) (App. 23a-25a).

Mr. Klein then argued (App. 25a-26a):

> I represent Mr. LaPonzina. There are two separate indictments here, Counts One and Two are part of the first indictment and Three and Four

> are as to the second. Mr. LaPonzina is only named in Count Three and Four. Mr. LaPonzina really does not have a defense of entrapment. The entrapment only goes to Mr. Gentile in Counts One and Two. It is my duty as an officer of the Court, where I can shed some light on the subject, to volunteer. It was Mr. Schettino's motion on behalf of Mr. Gentile, I did not join in the motion and I said I'll have to consult with my client and I came back and informed you, "No."
>
> Nevertheless, your Honor then said I will take it that it was--de facto I think you said consent--something to that effect. I assure your Honor that I couldn't have joined in any motion--

Thereafter the court denied renewed motions by both defendants to dismiss the indictment (App. 26a).

The second trial began two days later. At that time in his opening statement to the new jury, Mr. Schettino told them that there was a defense of entrapment, the nature of which he explained (App. 32a-33a). Mr. Klein, while avoiding the word "entrapment", told the jury in his opening that the star of this "scenario" was government agent Tsosos, who was the principal actor, the author who prepared the script, and who tried to steer LaPonzina into making admissions and put words in his mouth, although he had no prior propensity to bribe (Gov't. App. 1b, 2b).

Before the charge to the jury, Mr. Schettino discussed with the judge what he thought should go into an entrapment instruction (App. 479a-480a). The judge instructed fully on entrapment as to both defendants, although near the close of his instruction he referred to defendant in the singular (App. 514a-517a). Mr. Klein objected that he had used the singular, but the

judge thought that he had not done so and denied the objection (App. 522a).

ARGUMENT

I

THE PROSECUTION OF LaPONZINA WAS NOT BARRED BY DOUBLE JEOPARDY.

As the court below pointed out (App. 23a): "The attorneys for both defendants ... argued the prosecutor's opening statement would be prejudicial and could not be cured by the Court issuing cautionary instructions." In these circumstances, as we detail below, the district court [redacted] could properly declare a mistrial and subject both defendants to a second trial even though LaPonzina's attorney refused to join in the mistrial motion.

From the first, LaPonzina's attorney, Mr.Klein gave active and vociferous support to the motion for mistrial made by Gentile's attorney, Mr. Schettino. Mr. Schettino emphasized in his motion that the assistant United States attorney, throughout his opening, had mentioned other similar offenses by Gentile and that counsel had no right to anticipate a defense of entrapment. The court mildly reproved the assistant, "Yes, you should not have made that statement", referring to the assistant's concluding mention of entrapment. The assistant replied that entrapment was already in the case by a motion of Gentile before Mr. Schettino got in the case. When the court repeated its admonition, saying that there was no right to anticipate such a defense because the defendant might stand

mute, Mr. Klein joined in, affirming the correctness of the court's statement.[3/] When the court repeated that the government had no right to anticipate this defense, Mr. Klein again asserted the same view (supra, p. 10).

At this point the court said that there was a problem but it did not know how serious the problem was. Mr. Klein immediately stepped in to convince the court of the seriousness of the problem, saying that the prosecutor had put the defendant where he is "either forced to go with it, or sit still" and that either alternative is prejudicial. The clear implication was that the constitutional right to remain silent had been interfered with. With the case in this posture and Mr. Klein having had the last word, the court took a recess to decide what to do (supra, p. 11).

When the judge returned to the bench, he asked Mr. Klein whether the mistrial motion was being made by both parties. Mr. Klein avoided a direct answer, saying that Mr. Schettino made the motion. When the court pushed for a direct answer, Mr. Klein said that he would have to consult his client. He then reported to the court that they felt entrapment really affects Mr. Gentile and it was not their motion to make (supra, p. 11). From this point on, however, Mr. Klein sought to dissociate himself from the contentions he had previously

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3/ Later, both defendants did stand mute and asserted a defense of entrapment notwithstanding.

made to the court. He sought to say that he was not speaking for his client but that he was speaking "in assistance of Mr. Schettino's argument" (supra, p. 12). In short, Mr. Klein admitted his participation in the argument, but said that he did not join in the motion. It was in these circumstances that the court said that the best solution was to declare a mistrial and get a new jury right away and that there was a manifest necessity for proceeding in this manner for the ends of public justice, citing the Perez and Somerville cases (supra, p. 12). Both defense attorneys thus convinced the court that there was a necessity for a mistrial, a process in which Mr. Klein actually took a more active part than did Mr. Schettino. Having done so, neither should be heard to say that the court was wrong, because if it was wrong, it was their arguments which did the convincing. "You cannot run with the hare and chase with the hounds." Both attorneys quickly forgot their protestations as to whether entrapment was an issue in the case, both saying that entrapment was an issue in their opening statements to the new jury, a position which they maintained throughout the case (supra, p. 12). But LaPonzina cannot be heard to say that there was no necessity for what the court did, as his attorney was urgently pressing the court that prejudicial error had been committed. Having done his full part in convincing the court, Mr. Klein's subsequent attempts to dissociate himself and his client from the court's action should be rejected.

The earliest and best statement of the rule as to when the court properly may abort a trial and order a new trial was expressed by Mr. Justice Story in Perez v. United States, 9 Wheat. 579, 580 (1824):

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject, and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes and in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office.

In the instant case, after successfully arguing to the trial court that the assistant United States attorney's opening statement constituted prejudicial error, Mr. Klein reversed course and argued against the action that the court took and specifically refused to consent to a mistrial. But consent is not always determinative on these matters. In Gori v. United States, 367 U.S. 364 (1961), defendant's conviction on a second trial was upheld although the first trial had been aborted without his consent. The reasons for such abortion were not entirely clear, but the court's purpose was to protect the defendant. Similarly here, the purpose of Judge Costantino,

was the protection of the defendants on the ground, eagerly urged by the counsel for each defendants, that it was improper for the assistant to anticipate (correctly, as it proved by subsequent events as well as by prior signals) that entrapment would be a defense. In both Gori and the instant case, the question was not so much whether the trial court's reason for declaring a mistrial was sound, but whether its purpose was to protect the defendant.

By contrast, in United States v. Jorn, 400 U.S. 470, upon which LaPonzina places principal reliance,[4/] the Supreme Court draws the distinction that the purpose of District Judge Ritter was to protect the rights of government witnesses against self-incrimination, which he believed had not been properly safeguarded. The rather precipitate action of the trial court in aborting that trial was taken without any apparent consideration of the defendant's valued right to have his trial completed by a particular tribunal" (400 U.S. at 484). Mr. Justice Harlan, speaking for a plurality of the Court, was at pains to point out that "it becomes readily apparent that a mechanical rule prohibiting retrial whenever circumstances compel the

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4/ LaPonzina also relies on United States v. Walden, 448 F.2d 925 (4th Cir. 1971). This opinion however, was set aside on rehearing en banc when the decision of the district court was affirmed by an equally divided court. United States v. Walden, 458 F.2d 36 (4th Cir. 1972).

discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide" (400 U.S. at 480). He cited a number of cases in which, in varying circumstances, a trial judge was held to have properly exercised his discretion in declaring a mistrial without the defendant's consent: Simmons v. United States, 142 U.S. 148 (1891); Logan v. United States, 144 U.S. 263 (1892); Thompson v. United States, 155 U.S. 271 (1894); and Wade v. Hunter, 336 U.S. 684 (1949) (400 U.S. at 481-482). He also recognized the continuing validity of United States v. Tateo, 377 U.S. 463 (1964), where a successful collateral attack on petitioner's conviction, on the ground that his guilty plea was coerced, was held not to bar his retrial (400 U.S. at 484, n. 11). In a word, LaPonzina's sole reiliance upon Jorn is wholly misplaced.[5/]

LaPonzina fails to make any mention of Illinois v. Somerville, 410 U.S. 458 (1973), where the Supreme Court, after reviewing the principal cases, held that the abortion of a trial in an

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5/ Downum v. United States, 372 U.S. 734, the only other case in which the Supreme Court has held that reprosecution was barred, a mistrial was declared, not for the benefit of the defendant, but to enable the government to secure the presence of a missing witness. Note also that Chief Justice Burger, concurring in Jorn said, "If the accused had brought about the erroneous mistrial ruling we would have a different case" (400 U.S. at 488).

Illinois state court, without defendant's consent, in order to enable the prosecution to obtain a new indictment which would properly state the offense did not bar a retrial. Significantly, the Court quoted at page 1073 the full sentence in which a phrase originated in Wade v. Hunter, 336 U.S. 684, where the Court says:

> What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the Public's interest in fair trials designed to end in just judgments (emphasis added).

While the courts have thus held that consent of the defendant is not a sine qua non to the declaration of a mistrial, if there is consent it will bar a subsequent defense of double jeopardy. That consent need not be express; it may be implied from all the circumstances attendant on the declaration of mistrial. Gori v. United States, 367 U.S. 364, 365; United States v. Goldstein, 479 F.2d 1061, 1067 (2d Cir. 1973), cert. denied, 414 U.S. 873; Raslich v. Bannon, 273 F.2d 420 (6th Cir. 1959); Conner v. Deramus, 374 F. Supp. 504, 508 (D.C. M.D. Pa. 1974). Similarly, when defendants have succeeded in convincing a court that prejudicial error has occurred, they should not be allowed to take the position that a court should not act in their representation and terminate a trial in the interests of justice.

To be sure, LaPonzina had been the sole defendant, there would have been no problem in denying the motion and proceeding with the first jury. As matters stood, however, this solution was not available if two lengthy trials were to be held instead of

only one. This was a single offense, jointly committed. It was proper to proceed as the court did. Cf. Loux v. United States, 389 F.2d 911, 920-921 (9th Cir. 1968).

Any right of LaPonzina to proceed to trial with the jury first selected had been waived by his attorney's arguments, found convincing by the court, that error had occurred. Especially in view of the short time involved before the first jury, the claim that LaPonzina's constitutional rights were abridged is lacking in substance. Illinois v. Sommerville, supra, 410 U.S. 458, 469 (1972); United States v. Pridgeon, 462 F.2d 1094, 1096. Taking all the circumstances into consideration, the court's ruling served the ends of public justice, as broadly outlined by Justice Story in Perez v. United States, 9 Wheat. 579. There was no abuse of discretion.

II

THE TRIAL JUDGE WAS NOT REQUIRED TO DISQUALIFY HIMSELF SUA SPONTE FROM APPELLANTS' POST TRIAL MOTIONS AND FROM IMPOSITION OF SENTENCES.

There is no substance to the argument "that the judge could not have impartially decided the motions to set aside the jury verdicts or imposed impartial sentences because the judge's own personal disciplinary difficulties must have been foremost in his mind and he must have been inclined to 'bend backwards in order to please and pacify this tribunal" (Def. Br. 15).

As we understand the contention, it is that the judge "was subjected to the intense personal pressure of disciplinary proceedings in the midst of the appellants' case" and that this affected him in the disposition of post-trial motions and in the disposition of post-trial motions and in the imposition of sentence (Def. Br. 11-13). According to our information, the inquiry and proceedings in question were terminated more than a month before the disposition of the post-trial motions and the imposition of sentences. Defendants did not request that the judge disqualify himself. Nor is there any contention that the judge was in any way influenced during the trial of the case itself. In any view of the issue sought to be raised, the trial judge properly proceeded to the conclusion of this case, which was tried before him. Certainly there was no plain error in his failure to disqualify himself sua sponte.[6/]

6/ In this connection it is urged further that the presentence report improperly contained hearsay as to defendants being involved in organized crime, in loansharking and as "muscle men". The court, in the exercise of its discretion, made available to defendants the probation officer's presentence report and a hearing was held at which she was examined by defendants as to these matters (App. 569a, 579a, 587a, 588a-589a, 591a, 599a). The probation officer stated that she obtained her information from the IRS and from the United States Attorney (App. 595a, 599a, 603a). There was no error in receiving this material. Rule 32(c)(2) provides that the presentence report "shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or granting probation or in the correctional treatment of the defendant, and such other information may be required by the court. The court's inquiry in such matters is "broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." United States v. Tucker, 404 U.S. 443, 446.

III

TESTIMONY BY THE IRS AGENT AS TO ADMISSIONS BY DEFENDANTS WAS NOT OBJECTED TO AND WAS NOT SUBJECT TO SUPPRESSION.

Agent Tsosos described on direct examination his procedure when he first interviewed Gentile, in the following language (App. 53a):

> I identified myself to Mr. Gentile. I produced my credentials. I told him I was a special agent and there was a criminal investigation and I wanted to ask him questions but he did not have to answer my questions.

He continued, that Gentile said he understood that and to go ahead and ask him questions (App. 53a). Without objection, Tsosos testified as to the answers given during the ensuing interview, lasting three to four hours (Tr. 106). Later interviews with Gentile on September 21 and 23, November 31, and December 30, 1971, as well as interviews on May 30, June 12 and 14, 1972, were testified to without objection (Tr. 119-270). On June 29, 1972, according to the agent's testimony, Gentile introduced him to LaPonzina and questioned him. He did not testify as to giving LaPonzina any warning and there was no objection (Tr. 276-279). Testimony as to what LaPonzina and Gentile said at subsequent meetings on August 3, 8, and 9, 1972, was likewise admitted without objection (Tr. 276-343). By failing to object, defendants waived any contention that the evidence was inadmissible. It was only on cross-examination that questions were asked as to failure to comply with

IRS regulations (App. 160a-164a, 215a-219a).[7]

During a conference preceding the charge, Mr. Klein raised a question as to the effect of noncompliance with the IRS regulations in the following manner (App. 459):

> I request that if the Jury finds that, as a matter of fact, I ask you to find it and suppress all evidence. [8]

The court did give the following instruction (App. 518a):

> You have heard testimony that Agent Tsosos, in violation of an administrative regulation of the Internal Revenue Service, failed to advise the defendants of their rights at his initial meeting with each defendant. You must treat this information like any other piece of evidence, that is, you must determine the weight to be given this testimony.

---

[7] The applicable IRS regulation directs the agent to identify himself, produce his credentials and then to advise the subject in substantially the following language (App. 534a):

> In connection with an investigation of your tax liability (or other matter) I would like to ask you some questions. However, first I advise you that under the Fifth Amendment to the Constitution of the United States, I cannot compel you to answer any questions or to submit any information if such answers or information might tend to incriminate you in any way. I also advise you that anything which you say and any documents which you submit may be used against you in any criminal proceeding which may be undertaken.
> I advise you further that you may, if you wish, seek the assistance of an attorney before responding.

[8] See also App. 35, which, without reference to the record, purports to be a request to instruct along similar lines.

This was not a custodial situation and Miranda v. United States, 384 U.S. 436, could have no application. It is held in this circuit that failure to comply with this regulation does not require suppression of evidence given in reply to IRS interrogation. United States v. Squeri, 398 F.2d 785 (2d Cir. 1968). And see United States v. Viviano, 437 F.2d 295, 300-301 (2nd Cir. 1970), cert. denied, 402 U.S. 983. Failure to give a warning to a person under investigation for tax evasion would not justify the offer of a bribe. Cf. United States v. Knox, 396 U.S. 77 (1969). Defendants received more than their due in the instruction given.

IV

PORTIONS OF THE GOVERNMENT SUMMATION COMPLAINED OF WERE NEITHER IMPROPER NOR DID THEY CONSTITUTE A DENIAL OF DUE PROCESS OF LAW.

As defendants correctly anticipate (Def. Br. 21), our answer to the contention about "jam on the face" is that the exchange had its origin in remarks by Mr. Klein, which were answered by the prosecutor Mr. Barlow. Mr. Klein, using language similar to that in his opening statement (supra, p. 13), saw this case as "nothing more than a scenario with a script that was prepared in advance and a star" (Tr. 902). According to him, the star was Tsosos, a "programmed robot" who responded to suggestions from Barlow, but who called himself a "square shooter". Mr. Klein asked whether Tsosos was a square shooter

when he wore the transmitter, directed the conversation with Gentile and lied in various ways in his testimony, and said Tsosos had "four to six back-up men" (Tr. 903-904). Counsel continued that Tsosos "had jam on his face and jam on his fingers"; that Mr. Barlow had prepared the agent's false answers and that he, too, had jam on his face (App. 461-462).

In reply, Mr. Barlow said that Tsosos' testimony was fully corroborated by the tapes and by the testimony of King and Shanley and that the jam would have to be spread on the face of Mr. Dillon, who presented Tsosos to the grand jury. When Mr. Klein objected "to the prosecutor putting his credibility on the stand with the witnesses", the court, at Mr. Klein's request, instructed the jury to disregard Mr. Barlow's statement (App. 464-465).

We suggest that the prosecutor's integrity and credibility had already been put in issue by the defense argument. If there was any impropriety in the reply, which we deny, there still is no error in the trial, inasmuch as the court fully complied with counsel's request that the jury disregard the statement.[9/]

9/ Counsel's endeavor to extend his trial objection by here urging that Mr. Barlow expanded counsel's remarks so as apply to other members of the prosecution staff (Def. Br. 21-22) seems to admit the slenderness of the original defense objection, which the court sustained. It would also seem that when Mr. Klein mentioned "four to six back-up men", it was to such witnesses as King and Shanley that reference was made.

With respect to the remaining claims of prejudice and denial of due process arising from the government summation, the court sustained the objection referred to in paragraph (b) at page 22 of defendants' brief. The contention under (c) is to us unclear. The claim under (d) of impropriety in Mr. Barlow's characterization of Gentile as "a walking textbook on how to bribe people" was unobjected to and, in any event, would seem to be accurate (see supra, p. 6).

V

THE COURT DID NOT INVADE THE PROVINCE OF THE JURY, AFTER IT HAD RETIRED FOR DELIBERATION, BY THE PLAYING OF ANY UNREQUESTED TAPES.

This wholly factual question is resolved adversely to defendants' contention by an examination of the record. The first thing shown is a statement by the court (App. 525a):

> At first, we're going to bring the jury in. Note on the tapes, they want to hear tapes in reference to Count Three as to one thousand dollars and the golf lessons. I understand on two different tapes.

Mr. Klein said that "it", apparently referring to the jury's note (see infra following paragraph), says 'Tape,' it doesn't say, 'tapes." The court instructed Mr. Klein that at this stage it would conduct the proceeding and find out what the jury wanted (App. 525a). The jury was brought in and the court read aloud the note (App. 526a):

> We would like to hear the tape connected with Count Three referring to one thousand dollars and golf lessons.

The foreman said the jury wanted to know about the one thousand dollars and the court said that would be played for them. The foreman said the date was August 8 or 9. Mr. Barlow said they had August 30. Mr. Klein said that was not what the jury asked for. The court said that the jury would tell what they wanted (App. 5262-527a). Mr. Barlow gave the court a transcript, saying that it began on page 20 of 6-B and that the very first paragraph on page 21 was the reference to the $1,000. (App. 530a).

The first part of the colloquy and playing of tapes which followed is shown in the Defendants' Appendix, pages 531a-533a[1]:

> THE COURT: Now, you understand what you're listening to, if it's what you want, you say so. If not, advise the Court and then I will go on to something else and try to find any other part you want to hear. If you want to hear all of it, you have a right to hear that, too; you understand that?
>
> THE FOREMAN: Yes, thank you.
>
> THE COURT: You must make up your mind what you want and no one can tell you that at this stage of the proceeding.
>
> THE FOREMAN: I understand.
>
> MR. KLEIN: If Your Honor please, instruct the jury this is August 3rd between Mr. Gentile and Mr. Tsosos.
>
> THE COURT: August 3rd between Mr. Gentile and Mr. Tsosos.
>
> (The tape is played to the jury)
>
> THE COURT: Would you want to write out the next note or would you want to tell me?
>
> THE FOREMAN: One point that seems to be a little bit confusing. The point of the transferring of a thousand dollars from one party to another. That is one party.

THE COURT: I cannot explain to you whatever it is, that's what--that's why your're listening to the tapes. You must come to the conclusion whether those tapes are explicit as to whether those tapes are conclusive.

THE FOREMAN: Is there a tape for the 9th or the 8th?

THE COURT: Was there a tape for the 8th or the 9th involving a thousand dollars?

JUROR NUMBER TWO: Eight or nine of August meeting between Mr. LaPonzina and Mr. Tsosos.

THE COURT: LaPonzina and Tsosos?

JUROR NUMBER TWO: That's right.

THE COURT: You can hear that. You can hear that in its entirety if you wish.
Now, I want to know what specific part you want to hear. Just the conversation between them in its entirety?

JUROR NUMBER TWO: I think that would clear the problem.

THE COURT: Play that in its entirety.

(Tape played to the jury.)

MR. BARLOW: Your Honor, that's the end of the tap.

JUROR NUMBER NINE: Could we leave for a few minutes, your Honor?

THE COURT: Sure can.

(Jury leaves the courtroom.)
(A short recess is taken.)

The immediate continuation of these proceedings is shown on pages 46b-47b of the Government Appendix:

THE COURT CLERK: Jury note marked as Court Exhibit Number 5.

THE COURT: What's the date?

MR. BARLOW: Is-- that would be August 9, your Honor.

THE COURT: August 9. Who's it between?

MR. BARLOW: Mr. Gentile and Agent Tsosos.

(The jury enters the courtroom at twelve-thirty P.M.)

THE COURT: Your request has been found on the August 9th, and it's Mr. Gentile and Mr. Tsosos.

(The tape is played for the jury.)

THE COURT: Any time you wish to stop, you may stop.

THE FOREMAN: Oh, yes, we understand that, sir.

* * * *

THE CLERK: Jury note marked as Court Exhibit number 6.[10/]

It thus appears that the jury, by separate notes (Court's Exhibits 5 and 6) clearly requested the playing of two tapes, for August 8 and 9, respectively. These were played, to the jury's full satisfaction. There was no invasion of the jury's privacy.

VI

THE EVIDENCE AMPLY SUSTAINED LaPONZINA'S CONVICTION.

It will, of course, be borne in mind that acts and declarations of Gentile in furtherance of a plan for the adjustment of LaPonzina's tax liability were in no way binding upon LaPonzina until the existence of such a plan was shown by independent evidence of Laponzina's acts and declarations.

10/ Shortly thereafter, the jury found both defendants guilty as charged (Tr. 1051).

The first approaches to an arrangement for such an adjustment appeared through the conversations of Gentile with Tsosos. On June 14, 1972, they had established a rapport as to the disposition of the government's tax claim against Gentile. At this point, Tsosos advised Gentile that he was investigating LaPonzina and suggested that Gentile arrange a meeting. On the following day, Gentile said he had discussed the matter with LaPonzina. They arrived at an understanding that $1,000 would be a reasonable compensation to Tsosos in bringing about an adjustment. On June 29, Gentile introduced Tsosos to LaPonzina and they discussed the case in general terms (supra, p. 7).

On August 8, 1972, during the conversation in the car outside Gentile's office, LaPonzina told Tsosos that his intentions were "(w)hatever you and Joe spoke about, no problem" and gestured by rubbing his thumb and forefinger together. LaPonzina nodded that he wanted the case written off and whispered that he was satisfied and willing "to go along with you guys", after which he made the offer to arrange with a friend to give Tsosos some golf lessons, later writing the name of the friend on a card which he took from Gentile's desk. Arrangements were made for Tsosos to meet Gentile the following day (supra, p. 8).

As the court below properly held, the direct evidence of LaPonzina's implication established by a fair preponderance the basis for the jury to consider Gentile's acts and statements. See, e.g., United States v. Miley, 513 F.2d 1191, 1208

(2d Cir. 1975); United States v. Agueci, 310 F.2d 817, 826 (2d Cir. 1969), cert. denied, 372 U.S. 959. When on the following day Tsosos met Gentile and received the promised $1,000, the evidence of Laponzina's guilt was not only ample it was, to use a word borrowed from defendants, "devastating".

VII

DEFENDANT GENTILE FAILS TO POINT OUT WHAT EVIDENCE OF PRIOR CRIMINAL ACTIVITY WAS IMPROPERLY ADMITTED OVER HIS OBJECTION.

We are unable to ascertain from defendant's statement on this point what evidence was admitted and what efforts were made to exclude it. The only record reference is to pages 82a-83a of Defendants' Appendix, which is only a short colloquy between Mr. Schettino and the court in which Mr. Schettino refers to the transcript of a conversation on June 12, 1972 in which Tsosos says to Gentile, "Joe, I know you are the banker." Mr. Schettino follows this up by saying, that "these transcripts eventually get into a topic about--well, who wants the satisfaction about this", after which there is more discursive talk about Joe (Gentile) being a bookmaker and a loan shark (App. 83a). The objection seems to be that there was an inadequate redaction of some tapes, but just what evidence should have been excised and what efforts were made to accomplish this never appear. No error has been shown.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the convictions of both defendants should be affirmed.

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CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Appellee's Brief have been mailed by airmail this _____day of August,1975, to Irwin Klein, Esquire, 2 Park Avenue, New York, N.Y. 10016.

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UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

August 29, 1975

Honorable A. Daniel Fusaro, Clerk
United States Court of Appeals
For The Second Circuit
New York, New York 10007

Joseph Gentile and Ernest LaPonzina v. United States
No. 75-1248 (C.A. 2)

Dear Mr. Fusaro:

Enclosed for filing are twenty-five (25) copies of the Brief for Appellee and fifteen (10) copies of the Government's Appendix in the above-entitled case.

Copies have this day been mailed to counsel for appellants.

Sincerely,

Kirby W. Patterson

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